111-335

Supreme Court of the United States

October Term 1883 No. 247

EMILIE MOULOR

plaintiff below and plaintiff in error

vs.

AMERICAN LIFE INSURANCE COMPANY

defendant in error and defendant below

Brief for Defendant in Error

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SIDDALL BROTHERS PRINTERS

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Argument

When this case was lately before the Supreme Court (Oct. Term, 1879, reported in 11 Otto, p. 708) the learned judge, Mr. Justice Strong, who delivered the opinion, reversed the judgment of the Circuit Court, and remitted the case for a new trial, on the ground that it should have been submitted to the jury on the evidence, which consisted of the somewhat conflicting testimony of the plaintiff's usual medical attendant and the physicians selected by the defendants to examine him. He further took the ground that the witness, Dr. Mathieu, did not testify positively that Moulor had the disease for which he treated him, but his testimony is that Moulor never learned it from him or any other physician, and that he never suspected, or had the remotest idea, that he was affected with any such diseases. The witness further testified that the asthma which Moulor had was the dry nervous asthma, attended by no expectoration, and that there was nothing connected with it to make the patient believe he had it. As to the first stage of consumption, there was no softening of the tubercles, and therefore no expectoration of tuberculous matter. As to the scrofula, that was a very mild diathesis.

This was all the testimony adduced, and now relied upon to prove that the answers in the application are untrue. There was, however, in evidence the statement of

two medical examiners attending the applicant. They represented the assured as in perfect health, and as having never had any constitutional disease, except yellow fever, a curvature of his spine in early youth, and as having no predisposition, either hereditary or acquired, to any constitutional disease. We are of opinion that this evidence did not warrant peremptory instructions to the jury to find a verdict in favor of the defendants.

The testimony of Dr. Mathieu was parol. Its credibility, as well as its effect, was for the jury, especially as it was not positive and unqualified that Moulor had had the diseases for which the witness had treated him, and as the statements of the examining physician, which were in evidence, tended in some degree to prove that he never had. The jury might perhaps have drawn the conclusion from Dr. Mathieu's testimony that they were only predispositions to the diseases, and not the diseases themselves. He stated in regard to the asthma, for which he treated Moulor, that it was attended with no expectoration, and that there was nothing connected with it to make the patient believe he had it.

* * * * * * * *

That he was treated for them is not conclusive that he had them. The most skillful treatment is sometimes given when the existence of a particular disease is only suspected and not known, and when it afterward appears that the physician was mistaken.

The case having been remanded, was again tried on the 4th day of October, 1880, and a verdict found on the 5th of October, 1880, for the defendant. The truth or falsity of the plaintiff's answers contained in the application have, therefore been settled by

the tribunal to which they were referred, and a jury have ascertained that in respect to each of the following diseases: consumption, scrofula, and asthma, the plaintiff had answered falsely. They have found, in addition, that Dr. Mathieu had attended him as his physician since 1855 (policy of insurance upon his life issued June 17th, 1872) for chronic asthma; first stages of consumption in 1858 and 1859; and afterwards for slight indisposition from time to time, besides the asthma to which he was constitutionally subject; "and I also treated him for scrofula from "1858 to the time of his death, which was January "3rd, 1873."

The case was remanded for trial that the truth or falsity of these statements might be determined by the proper tribunal; and it is submitted that this Court will not review any matters of fact, but will accept them as *res adjudicata*. And that, in consequence, the present case must fall into the unbroken line of decisions of which

*Etna Life Insurance Co. vs. France**

and

Jeffries vs. Life Insurance Co.†

are leading cases.

The only question that remains to be considered is: Were the answers warranties by the insured, or representations? It must be conceded that the

* 1 Otto 510

† 22 Wallace 47

application and the policy of insurance are one and the same paper, for it is covenanted by the assured

> that this application shall form a part of the contract of insurance, and if there be in any of the answers herein made any untrue or evasive statement, or any misrepresentation, or concealment of facts, then any policy granted upon this application shall be null and void.

The stress that the plaintiff's counsel, therefore, lays upon the fact that the policy does not contain the word "warrant," and that the application can create no independent liability falls to the ground. The learned counsel has fallen into the mistake that intention is the test of veracity. "Warranty and truth," he says, "are incongruous ideas." "The truth of a statement or answer necessarily implies a representation, and cannot relate to a warranty." But that is not the fact; for in the application the answers upon which the policy of insurance was issued are declared and "**warranted**" to be fair and true answers to the questions put; and his argument would seem to be strangely inconsistent; for, he further adds: —

> The application contains a declaration that the answers were warranties, and if not in all respects true and correct the policy should be void.

There is no pretence by the defendants that the answers were fraudulently made, or that the concealments by the plaintiff were intentional. The simple question is: Was the representation made? Second, Was it false? The jury have found that it was false. The argument of the plaintiff in error in

*Jeffries vs. The Life Insurance Company**

was based upon the fact that the statements contained in the decedent's application were not warranties, and Mr. Justice Hunt, in delivering the opinion of the Court, said: —

> The statements need not come up to the **degree** of warranties. They need not be representations, even if this term conveys an idea of an affirmation having any technical character. "Statements and declarations" is the expression; what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in his application it must be true. If he makes any declaration in the application it must be true.

And, further, in the case of the

Etna Life Insurance Company vs. France et al.†

where a party in order to effect an insurance upon his life agreed that if the proposals, answers, and declarations made by him, and which he declared to be true, and which were made part and parcel of the policy, the basis of the contract, and upon the faith of which the agreement was entered into, should be found in any respect untrue or fraudulent, then, and in such case, the policy should be null and void. *Held*

* 22 Wallace 47

† 1 Otto 510

Ins. Co. vs. Trefz, 14 Otto 197

that the company was not liable if the statements made by the assured were not true. The agreement of the parties that their statements were absolutely true, and that their falsity in any respect should void the policy, removes the question of their materiality from the consideration of the Court or jury.

The attempt has been made to show that a warranty amounts to no more than a representation, if the thing warranted was not within the knowledge of the applicant, and could not have been derived by him from an independent source of information, and the applicant fortifies this position upon the statement of Dr. Mathieu: —

I did not impart to said Moulor a knowledge that he was affected with any of said three before-mentioned diseases out of a feeling of humanity, a rule I never deviate from in my practice whenever the mind of the patient might be affected thereby.

* * * * * * * *

He never learned from me nor from any other physician in this city, nor did he suspicion or have the remotest idea that he was affected with any of such diseases himself. On the contrary he always boasted and prided himself as being a strong, healthy, and robust man.

But neither the integrity nor the knowledge of the plaintiff need be called in question. He undertook to warrant himself sound. He undertook to warrant his answers. And he could only found his

claim to recover against the defendants on the ground that his answers were in all respects true. The fact that they were false has been found by a jury.

I

The second assignment of error is as follows: —

The jury are entitled under the evidence to find as a fact, according to the certificates or reports of the defendants' agents and medical examiners, that Louis Moulor did not have any affection which, in ordinary parlance, reaches the gravity of a disease.

The attempt to show that a jury, under any circumstances, are judges of the gravity of symptoms, could at best only rest upon the assumption that men unlearned in a special and most important science were to adjudicate the existence of a disease.

The plaintiff quotes the case of

Cushman vs.

*The United States Life Insurance Company**

to maintain his position that the degree of ill health which constitutes disease is a fact for the jury. That

* 70 N. Y. 72

case has not been followed, and cannot be treated as an authority; but, — to treat it with respect, — as the learned counsel has relied upon it to sustain another part of his argument, it would amount to nothing, for in the present case the question of disease was submitted to the jury, and they found, as a fact that he had pronounced constitutional diseases, chronic asthma, manifestations of the first stage of consumption, and that Dr. Mathieu had also treated him for scrofula all the time from 1855 down to his death in 1873.

The argument is broached that when the limit of the insured's means and sources of knowledge are exhausted, he must, of necessity be taken as having answered truly in a moral sense. That may be so, and that argument is founded upon a Scotch case quoted at great length upon pages 25 - 26 - 27 - 28 and 29 of the counsel's brief, in which it is said that if a person is not guilty of any negligence in acquiring a true knowledge of his own condition, if this is not established, there is no breach of warranty. But that is answered fully by the illustration of a common carrier, who is not liable for latent defects only because he does not warrant the internal condition of his carriage. But, suppose they warranted the safe delivery of every passenger, what would it avail them if the inspection of the carriage had been

most diligent and thorough, that no external defect could be found or no latent one suspected? They would be then insurers, liable at all events to the absolutely safe conveyance to his destination of the person they carried. It is only because they are not warranters that latent and unsuspected defects excuse them from the result of accident: and even of that the highest kind of proof is required that they have used the utmost diligence and adopted every conceivable invention that might have obviated the particular accident. It cannot be said, after so apt an analogy, that an assured cannot warrant if he will that he is not nor ever has been the subject of latent and unsuspected disease. May not one warrant anything to be as he represents it, and abide the issue of his representation?

The argument of the plaintiff seems to be that no fact can be absolutely true that is inaccessible to consciousness, and that it is no more than a lucky accident if the fact coincides with the representation; but then he strangely adds: "The fact of disease as "a physical incident may be the subject of a war-"ranty." In this case the warranty is express in terms. Now, what is an express warranty? It is an unconditional agreement that any statement or representation, upon the full truth of which a contract is executed, shall be in all respects strictly and

entirely true. It is always unconditional. The party is liable, at all events; but even to meet his argument, that an assured cannot warrant anything but that of which he may obtain external information, we are confronted with the fact that in the twelfth inquiry of the application — "How long since the party was attended by a physician?" he answered: "Not since the year 1847, when I had the yellow "fever," and the jury have found that Dr. Mathieu had attended him professionally all the time since 1855, and is designated in the answer to the thirteenth question of the application as his usual medical attendant. That surely is an external fact, if you take the plaintiff's idea of a legitimate subject of warranty. He undertook to warrant a fact which was found to be false; an external fact, not relieved by the argument of innocence or ignorance, but one that he must have known at the time of making it was absolutely false.

Much attention is called to the fact that the term "medical attendant" does not mean more than that he was the doctor upon whom he would have called in an emergency, and that Dr. Mathieu regarded him rather as a contingent patient. But what relation does that bear to the fact, as ascertained, when Dr. Mathieu adds: "I attended him **as his physician,"** and he goes on to enumerate for what diseases?

If attendance might have an equivocal meaning, what becomes of it when the doctor not only attended but **treated** him all the time between 1858 to the time of his death for **a specific** disease?

*May on Life Insurance: Title Med. Attend.**

The defendants then stand in this position: —

All the disputed facts in the case have been finally determined. They are at rest. It only remains to be said that the twenty-eight assignments of error contain, in different form, the insistance of counsel that the innocence of the answers of the assured are his protection; that they were made in good faith and without fraud; and as this is the whole general statement of the question before the Court, it is respectfully submitted that it has been sufficiently disposed of in the argument, without special reference to the individual assignments.

In no better way could the law be stated than in those portions in the learned Judge's charge to the jury to which the plaintiff has excepted.

It is of no consequence [he says] whether he knew it to be true or untrue. He bound himself for its correctness, and agreed that the validity of his policy should depend upon its being so. That he did not know he was thus afflicted is of no consequence whatever, except that it may bear upon the question, Was he afflicted? If he was, his

* p. 404, sec. 304.

answer, to the truth of which he bound himself, was untrue; and his knowledge, or want of knowledge on the subject, is of no consequence. You must determine whether the assured was at any time afflicted with either of the diseases named. If he was, his answer in this respect is untrue, and, notwithstanding he may have ignorantly and honestly made it, the policy is void, and no recovery can be had upon it.

If any importance, at all, is to be attached to the fact that this contract was to be governed by the law of Pennsylvania, where the contract was to be performed, the latest case in Pennsylvania is to the effect of all the other authorities. In the

*Mutual Aid Society vs. White**

the application for a policy of insurance contained a provision that if any of the statements made therein were false, or tended to deceive the Society, the contract of insurance would be void. In answer to a question in the application the insured responded that he was of a certain age, and the insured having died, and suit being brought on the policy, the defendant defended on the ground that the insured had understated his age. *Held*, that the sole question was for the jury as to whether the statement of the insured was true or false.

* 12 W. N. C. Pa. 147

But what has this Court to do with the Supreme Court of Pennsylvania or the decisions in

*Shaible vs. The Washington Life Insurance Co.**

and

Power vs. The City Fire Insurance Company?†

both of which were peculiar in their circumstances and in neither of which was it pretended that there was even an implied warranty. In both of them the truth or falsity of the **representations** was properly left to the jury, as it must be done in all cases, and as it was done in this, with proper instructions as to the law according as they find the facts.

The adjudicated cases in Pennsylvania are altogether without point here, because there is not to be found **one** in which the insured "**warranted** his "answers to be fair and true." It is true some of them show a leaning to the view that the truth of an insured's statements is to be judged of to some extent by proof of the pains he took to inform himself, and that positive negligence in that respect would amount to such recklessness in making representations as might suggest a fraudulent intent. But no case has presented any facts that required a judge to say to the jury — The assured **warranted** himself free from certain ailments, and

† 28 L. I. 397.
* 9 Phila. 136.

the only fact for you to find is whether or not he had them. You have nothing to do with his innocence or ignorance; were his answers in every respect **true?**

It is singular that the two cases quoted by the plaintiff in error are not commented on or elaborated in his arguments.

But, of all things, it must be kept in prominent view that all such insinuations as that the assured was "cornered"; that his answers "are extorted from him," and that he is obliged to answer "in monosyllables," amounts to nothing, for the sixteenth question of his own application is as follows: —

Has the applicant reviewed the answers to the foregoing questions, and is it clearly understood and agreed that any untrue or fraudulent answer, or any suppression of fact in regard to his health, habit, or circumstances, or neglect to pay the premium on or before the time it becomes due, will, according to the terms of the policy, vitiate the same and forfeit the payments thereupon?

That was answered **"Yes."** Then followed the declaration of warranty that the above were "fair and true answers," and it was signed by the assured.

It is difficult to understand what there is in the facts of the present case to induce the Court to reconsider its former judgments in a number of cases similar in all respects.

HENRY HAZLEHURST

ISAAC HAZLEHURST

Counsel for defendant in error

APPENDIX

APPLICATION FOR INSURANCE

AND

STATEMENT OF PARTICULARS

ANSWERS OF MEDICAL EXAMINERS

AND OF AGENTS

APPLICATION F

In the AMERICAN LIFE INSUR

STATEMENT OF PARTICULARS RESPECTING THE PERSON WHOSE LIFE IS PROPOS
OF INSU

1.- What is the Name and Residence of the Person for whose benefit the Insurance is to be effected?

☞Write all the names in full.

If a married woman or widow, what was her maiden name?

☞Write Christian name in full.

State Relationship to Party proposed to be insured.

2. What is the Name, Residence, and Occupation, or Trade of the Person whose life is proposed to be insured?

☞Write all names in full.

3.- Place and Date of Birth of the Person whose life is proposed to be insured?

Age, next birthday?

4.- Are the Party's parents living? If so, how old? If not, at what age and of what disease did they die?

State the Father's name in full.

5.- Has the Party ever been addicted to the use of opium or other stimulants or been intemperate in the use of alcoholic or other beverages? Are the Party's habits now regular and temperate?

OR INSURANCE

ANCE COMPANY, of Philadelphia.

ED FOR INSURANCE, AND WHICH STATEMENT FORMS A PART OF THE CONTRACT
RANCE

Name, Emilie Moulor,
Residence, New Orleans,
County of Orleans, State of La.
Married. Emilie Dilcroix.

Wife & Children.
Name, Jean Bernard Moulor dit Louis Moulor.
Occupation or trade, Merchant.
Residence, New Orleans,
County of Orleans, State of La.
Place, Germ. France.
County of State of
Date of Birth, September 19th, 1819.
53 years.
Father living; about years old.
Mother living; about years old.
Father died, aged about 72 years, of old age.
Mother died, aged about 65 years, of Don't know.
Francisca Moulor.
No.

Regular & temperate.

6. Has the party been successfully vaccinated?

7.- Has the Party ever been afflicted with any of the following diseases?

☞ Answer Yes or No to each.

8. Has the Party experienced any wound, hurt or other serious bodily injury?

9.- Is the Party now in good health, and does he usually enjoy good health?

10. Has the Party's father, mother, brothers or sisters been afflicted with consumption, or any other serious family disease, such as scrofula insanity, &c., &c.?

11.- How many Brothers and Sisters of the Party are now living? What the ages and state of health?
How many dead; at what ages and of what diseases did they die?

12. How long since the Party was attended by a Physician?
For what disease or diseases?

13.- Give the name and residence of the Party's usual medical attendant. And the name and residence of one Intimate Friend.

14. Is there any circumstance which renders an Insurance on his life more than usually hazardous, such as place of residence, occupation, physical condition, family history, hereditary predisposition, constitutional infirmity, or other known cause, or any other circumstance or information with which the Company ought to be made acquainted?

15.- Has a proposal ever been made for insuring the Party's life in this or any other office, and if so, was it accepted or declined? If now insured, state in what company, and for what amount?
Has the Party ever been Medically Examined, with a view to Life Insurance?

16.- Has the Applicant reviewed the answers to the foregoing questions, and is it clearly understood and agreed, that any untrue or fraudulent

He has.

Insanity? No. Gout? No. Rheumatism? No. Scrofula? No. Palsy? No Convulsions? No. Dropsy? No. Small Pox? No. Yellow Fever? Yes. Fistula? No. Rupture? No. Asthma? No. Spitting of blood? No. Consumption? No. Any diseases of the lungs or throat? No. or of the heart? No. or of the urinary organs? No.

No.

He does.

No. Not since childhood.

Brothers living.	Ages	Health
Sisters living.	Ages 4	Health
Brothers dead.	Ages	Disease
Sisters dead.	Ages 2	Disease don't know died in Europe

Not since the year 1847 when he had the yellow fever.

Dr. Mathiew of New Orleans.

No.

No.

The Party is now insured in the following Companies, viz:

No $. No $

No $. No $

No $. No $

answers or any suppression of facts, in regard to health, habits, or circumstances, or neglect to pay the premium on or before the time it becomes due, will, according to the terms of the policy, vitiate the same, and forfeit all payments made thereon?

17.- Sum to be insured (write words in full)
Premium payable Annually.

18.- Term for which the Insurance is required?

19.- What plan of Insurance is desired?

It is hereby Declared and Warranted That the above are fair agreed by the undersigned, that this application shall form a part of the co any untrue or evasive statements, or any misrepresentation or concealment void; and all payments made thereon shall be forfeited to the company. discover that any of said answers or statements are untrue or evasive, or th Company may refuse to receive further premiums or any policy so granted forfeited as aforesaid.

AND IT IS FURTHER DECLARED by the undersigned, that the party maki for Insurance, to the full amount applied for.

DATED at New Orleans,
WITNESS: S. A. Seeskind.

☞A husband may sign for his wife, thus: "Mary Smith, by John Smith." Where insurance is for the benefit of minor children, it should be signed "John Smith, as guardian (or trustee) for Mary A., Susan G., and Charles Smith, my children," or "children of————."

☞When the policy is taken in the person's own name, one signature is sufficient.

Write Christian names in full

Yes.

Ten Thousand Dollars.
Table No 6. Premium, $425.50.
Life term.
Stock plan.

and true answers to the foregoing questions; and it is acknowledged and
ntract of Insurance, and that if there be, in any of the answers herein made,
of facts, then any policy granted upon this application shall be null and
And it is further agreed, that if at any time hereafter the Company shall
at there has been any concealment of facts, then, and in every such case, the
upon this application, and said policy shall be null and void, and payments

ng this application has an "insurable interest" in the life above proposed

this 17th day of June 1872

Signature of the person or persons for whose benefit the Insurance is to be effected. } EMILIE MOULOR
L MOULOR

Signature of the person whose life is proposed to be insured. }

POLICY OF INSURANCE

POLICY OF INSURANCE

Number. Shares.

American Life Insurance Company

PHILADELPHIA

Charter Perpetual Incorporated 1850

This Policy Witnesseth, That the AMERICAN LIFE INSURANCE COMPANY, in consideration of the representations made to them in the application for this Policy, and of the payment of them in hand of ..... Dollars, and of the further ..... psemium of ..... Dollars, on the ..... day of ..... in each and every year during the continuance of this Policy, ...

Do Insure the Life of .....

of ..... in the County of .....

State of ..... in the sum of ..... Dollars, for the term of ..... natural life.

And the said Company do hereby Promise and Agree, well and truly to pay, or cause to be paid, the said sum insured, at their office in the city of Philadelphia, to ..... executors, administrators and assigns, within sixty days after due notice and satisfactory proof of interest and of the death of the said ..... deducting therefrom any indebtedness to the Company, and any unpaid balance on the premium of the current year.

Provided always, and it is hereby declared to be the true intent and meaning of this POLICY, and it is accepted by the assured upon these express conditions, that in case the said ..... shall, without the consent of this Company previously obtained, in writing, visit those parts of the United States which lie south of 32 degrees of North Latitude, between the first of June and the first of November, or shall, without such previous written consent, enter into any military or naval service whatsoever (the militia not in actual service excepted); or shall, without such previous written consent, be personally engaged in blasting, mining, submarine operations, or in the production or transportation of highly inflammable or explosive substances, or in working or managing a steam engine in any capacity, or as a Conductor, Brakeman, or Hand upon a Railroad, or as an Officer, Hand or Servant of any steam vessel, or in case ..... shall die by ..... own hand, or in consequence of a duel, or by the hands of justice, or by reason of intemperance from the use of intoxicating liquors, or opium or other narcotic, or in the violation of any law of any of these States or of the United States, or of any state or country, then this POLICY shall be void, null, and of no effect, except that in case ..... shall die by ..... own hand, while insane, the amount to be paid by the Company, on this Policy, shall be the amount of the premiums actually received thereon.

And it is hereby Declared and Agreed, That if the representations and answers made to this Company, in the application for this POLICY, upon the full faith of which it is issued, shall be found to be untrue in any respect or that there has been any concealment of facts, then and in such case, THIS POLICY shall be null and void; or in case the said premiums shall not be paid at or before 12 o'clock (noon) on the several days specified and appointed for the

payment of the same, at the office of the Company, in the city of Philadelphia, or to Agents, when they produce Receipts signed by the President or Treasurer, and with the corporate seal of the company, then and in every such case the said Company shall not be liable to the payment of the sum insured, or any part thereof, and the POLICY shall cease and determine, and all payments made shall be forfeited to the Company; but after three or more full years' premiums have been paid hereon, the Company will issue a paid up Policy payable at death, for about the amount of the premiums paid, provided application is made for the same, and the Policy, while yet in force, be duly surrendered to the Company.

And it is also Agreed, That this Policy, and the insurance effected, shall be subject to the several conditions and regulations printed on the back hereof, so far as the same can be applicable, in the same manner as if the same respectively were incorporated in this Policy.

☞No assignment of this Policy shall be of any force or effect, unless approved by the Company, and endorsed thereon by the Secretary or other authorized officer, within thirty days from the date hereof; otherwise the premiums shall be considered sunk for the benefit of the Company.

THIS POLICY shall not be valid until the actual payment of the premium has been made, and receipted for at the bottom of this Policy by the Treasurer, or by .....
..... Agent for .....

In Witness Whereof, the President of the said AMERICAN LIFE INSURANCE COMPANY, on behalf of the BOARD OF TRUSTEES, has hereunto subscribed his name, attested by the Secretary, and has caused the